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APR 12 1993
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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

MICHAEL L. BARKLEY,
PRIVATE E1, U.S. Army,
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

and other cases

Petition for a Writ of Certiorari to the United States Court of Military Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May the Judge Advocate General of an Armed Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, appoint commissioned officers to serve as trial and military appellate judges, on the theory that their appointment as commissioned officers already satisfies the Appointments Clause for both their judicial and non-judicial duties?

2. Does the Due Process Clause of the Fifth Amendment require that, in peacetime, military trial and appellate judges be appointed to their judicial offices for fixed terms?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 92-

MICHAEL L. BARKLEY,
PRIVATE E1, U.S. ARMY,*
Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent

and other cases

Petition for a Writ of Certiorari to the United States Court of Military Appeals

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PETITION FOR A WRIT OF CERTIORARI

The petitioners, Michael L. Barkley, *et al.*, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals, *United States v. Weiss*, 36 M.J. 224 (C.M.A. 1992), is reprinted as Appendix A at App. 1a. The unpublished decision of the United States Navy-Marine Corps Court of Military Review, *United States v. Weiss*, No. 89-4189

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* Full listing of parties to this proceeding appears on page ii.

(N.M.C.M.R. Jan. 31, 1992), is reprinted as Appendix B at App. 86a.

The unpublished decision of the United States Court of Military Appeals in *United States v. Barkley*, No. 93-0081/AR (C.M.A. Jan. 14, 1993), is reprinted as Appendix C at App. 88a. The unpublished decision of the United States Army Court of Military Review, in *United States v. Barkley*, No. 9102535 (A.C.M.R. Aug. 5, 1992), is reprinted as Appendix D at App. 89a. The opinion of the United States Court of Military Appeals, *United States v. Rice*, 36 M.J. 264 (C.M.A. 1993), is reprinted as Appendix E at App. 91a.

JURISDICTION

The decisions of the Court of Military Appeals were rendered between January 12, 1993 and March 15, 1993. The jurisdiction of the Court is invoked under 28 U.S.C. § 1259(3) (Supp. 1992).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Appointments Clause, U.S. Const. Art. II, § 2, Cl. 2 provides:

> The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Fifth Amendment provides:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

The relevant provisions of the Uniform Code of Military Justice, Article 6, 16, 26 and 66, 10 U.S.C. §§ 806, 816, 826, and 866, are set forth in Appendix F, Pet. App. at 93a. Rule for Courts-Martial 1002, Manual for Courts-Martial, 1984, is set forth in Appendix G, Pet. App. at 99a.

STATEMENT OF THE CASE

This is a consolidated petition representing all interested service members of varying ranks from the Army, the Navy-Marine Corps, and the Air Force, whose court-martial convictions were affirmed by the Court of Military Appeals between January 12, 1993 and March 15, 1993. In each case, the judicial appointment issue was raised. In each of the Navy-Marine Corps cases, the due process issue was also raised. In all cases, the Court of Military Appeals granted review to consider the judicial appointment issue, and rendered adverse summary dispositions in light of *United States v. Weiss*, 3 M.J. 224 (C.M.A. 1992) (Appendix A). Each case is factually distinct, and several cases raised other issues before the Court of Military Appeals which are not the subject of this petition.

Subsequent to the Court of Military Appeals' decision in *Weiss*, that Court acknowledged in *United States v. Rice*, 36 M.J. 264 (C.M.A. 1993) (Appendix E) that there were over 200 cases pending wherein the trial and appellate military judges were challenged because they were not appointed in accordance with the United States Constitution, Art. II, § 2, cl. 2. This petition consolidates those cases which were decided by the Court of Military Appeals through March 15, 1993. In *Rice*, the Court of Military Appeals recognized the possibility of a grant of certiorari and relief by this Court, and, if so, afforded petitioners the opportunity for further relief. This petition adopts and incorporates the same argument as set forth in *Weiss*, *infra* (No. 92-1482).

Like *United States v. Weiss*, this petition raises two closely related questions which go to the heart of judicial

independence for military trial judges who preside over courts-martial and for military appellate judges who review convictions. All military trial judges and almost all appellate military judges are commissioned officers and lawyers on active duty in their services. Unlike judges appointed under Article I or Article III, military judges are not appointed by the President with the advice and consent of the Senate. Nor are they appointed by the President alone, the head of a department, or a court of law composed of Article I or III judges. Instead, military judges are selected and appointed by the Judge Advocate General of their service, who is the senior uniformed lawyer in each armed service in charge of all military legal personnel, and who is responsible for the overall supervision of military justice matters. *See* Uniform Code of Military Justice art. 6(a), 10 U.S.C. § 806(a) (1988). Moreover, the Judge Advocates General who appoint military judges have absolute and unreviewable discretion to remove or transfer them out of their judicial assignments, and those judges lack protection if their decisions do not suit their Judge Advocate General. Accordingly, the method of appointment to judicial service in the Armed Forces violates the Appointments Clause, and the lack of any fixed term for those judicial offices violates the Due Process Clause of the Fifth Amendment.

1. *Institutional Framework.*

Under Article I of the Constitution, Congress has established a three-tier system of military courts. At the top is the Court of Military Appeals, which has five civilan judges appointed by the President with the advice and consent of the Senate for fixed terms. Uniform Code of Military Justice art. 142, 10 U.S.C.A. § 942 (West. Supp. 1992). The appointments and tenure of those judges are not at issue.

Below the Court of Military Appeals are four Courts of Military Review, one each for the Army, Air Force,

Coast Guard, and Navy-Marine Corps. Presently, there are approximately 35 appellate military judges, who may be either military officers or civilians, all of whom are appointed by the Judge Advocate General of their service. In addition, for each service's Court of Military Review, where petitioners' cases were heard, the respective Judge Advocates General, or, the Assistant Judge Advocates General sign and submit the judges' annual fitness reports, which are used to decide promotions, duty assignments, and susceptibility to involuntary early retirement. Although these courts are permanent courts, located in the Washington, D.C. area, none of the judges is appointed to a fixed term of office. Uniform Code of Military Justice art. 66(a), 10 U.S.C. § 866(a) (1988). The Courts of Military Review are typically divided into three-member panels, each with their detailed rules to manage and regulate dockets and the attorneys who practice before them. Absent waiver by an accused, the Courts of Military Review are required to review all cases in which a death sentence, confinement of one year or more, a dismissal, or a bad-conduct or dishonorable discharge is adjudged. Uniform Code of Military Justice art. 66(b), 10 U.S.C. § 866(b) (1988).

Military trial judges preside at special courts-martial and, if qualified, at general courts-martial.[1] Trial judges must be military officers, all of whom have been appointed as military officers by the President with the advice and consent of the Senate. However, their selection and appointment as a judge is made by the Judge Advocate General of their service. Like appellate judges, the trial judges have no fixed terms of office. Uniform Code of Military Justice art. 26(a)-(c), 10 U.S.C. § 826(a)-(c) (1988). Military trial judges are assigned to a circuit and are supervised by a Circuit Chief Judge, who in turn

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[1] Currently, there are approximately 95 judges from all of the services who are certified to preside at general courts-martial.

reports to and is supervised by the Chief Judge of the Trial Judiciary of the respective service.

Each armed force assigns military judges as and when it sees fit. Judges often serve a two- three- or four-year assignment. However, a judicial assignment can be terminated at any time through decertification as a judge or by transfer to other duties at the discretion of the Judge Advocate General of the judge's armed force.[2]

A court-martial can try any offense committed by a member of the armed services regardless of when or where the offense took place, who the victim was, what was done, or why it was done—the sole requirement is that the accused was on active duty in the military at the time of the offense. *Solorio v. United States*, 483 U.S. 435 (1987). A general court-martial may impose sentences that include death, imprisonment for life or terms of years, total forfeiture of pay and allowances, and/or a dishonorable or bad-conduct discharge (or dismissal for officers). 10 U.S.C. § 818 (1988). A bad-conduct or dishonorable discharge carries a permanent stigma, and it can have an adverse impact on civilian job opportunities, as well as on certain government-provided benefits. *See United States v. Ohrt*, 28 M.J. 301 (C.M.A. 1989); *United States v. Maharajh*, 28 M.J. 797 (A.F.C.M.R. 1989). Special courts-martial may impose up to six months of confinement, and/or forfeiture of up to two-thirds pay per month for six months, and/or a bad-conduct discharge. Uniform Code of Military Justice art. 19, 10 U.S.C. § 819 (1988).

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[2] William H. Cook, *Courts-Martial: The Third System in American Criminal Law*, 1978 So. Ill. U. L. Rev. 1, 17-18; 1 Francis A. Gilligan & Frederic I. Lederer, *Court-Martial Procedure* 14-31.00, at 518-19 (1991). The Judge Advocate General does not issue the actual orders for a transfer, but there is no doubt that, for all military lawyers, including military trial and appellate judges, he controls their actual duty assignments.

Military trial judges are, for all practical purposes, the equivalent of United States District Judges and Magistrate Judges who preside over criminal trial in federal district courts. The drafters of the Uniform Code of Military Justice wanted military judges to be "real judges" as commonly understood in the American legal tradition. *United States v. Graf*, 35 M.J. 450, 465 (1992). The military trial judge has far-ranging discretionary powers, including the power to "rule on all interlocutory questions and all questions of law raised during the court-martial," to "[i]nstruct the members [the jury] on questions of law and procedure which may arise," to "promulgate and enforce rules of court," and to "exercise contempt power." Uniform Code of Military Justice art. 48, 10 U.S.C. § 848 (1988). If the accused elects a bench trial, a general court-martial judge has even more discretion than does a district judge because the court-martial trial judge is not bound by the Federal Sentencing Guidelines. *See United States v. Brown*, 28 M.J. 470, 474 n.3 (C.M.A. 1989); *see generally* Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1002.

Courts of Military Review exercise all of the traditional powers of appellate courts including those under the All Writs Act. *See Dettinger v. United States*, 7 M.J. 216 (C.M.A. 1979). Additionally, these courts exercise an "awesome, plenary, *de novo* power of review[.]" *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Thus, a court "[m]ay affirm only such findings of guilty and the sentence . . . as it finds correct in law and fact. . . . [I]t may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact[.]" Uniform Code of Military Justice art. 66(c), 10 U.S.C. § 866(c) (1988).

2. *Rulings of the Court of Military Appeals.*

The Court of Military Appeals exercised its discretionary jurisdiction to consider petitioners' claims that the manner in which the trial and appellate military judges

in their cases were appointed violated the Appointments Clause of the Constitution, and that failure to appoint those judges to fixed terms of office denied petitioners liberty without due process. *See* Pet. App. 2a n.1. Several days before it heard argument in *Weiss*, the Court of Military Appeals issued an opinion rejecting the due process claim. *United States v. Graf*, 35 M.J. 450 (C.M.A. 1992).[3] Then, on December 24, 1992, a sharply divided court rejected petitioner Weiss's Appointments Clause argument and affirmed the Navy-Marine Corps Court's decision.

In order to garner three votes, the majority below needed two separate and largely inconsistent rationales. Judge Gierke, writing the lead opinion for himself and Judge Cox, agreed that Congress may establish a military justice system, but that Congress cannot declare an exemption for military judges from the Appointments Clause. Therefore, Judge Gierke held that military judges are officers who must be appointed in accordance with the Appointments Clause, either by the President with the advice and consent of the Senate, by the President alone, by a Head of Department, or by a Court of Law. Pet. App. 5a. This proposition was endorsed by four of the court's five judges. Pet. App. 21a, 36a, 77a.

Judge Gierke then held that the Appointments Clause is satisfied when a military officer is commissioned by the President with the advice and consent of the Senate, because military judges are simply military officers with legal training. Relying on *Shoemaker v. United States*, 147 U.S. 282 (1893), Judge Gierke first ruled that Congress had not created a "new office" when "Law Officers"

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[3] A petition for writ of *certiorari* in *Graf* was filed on December 29, 1992 (No. 92-1102), and it is incorporated by reference. In the interest of completeness, this petition will summarize the *Graf* decision, as well as the reasons for granting review of the Due Process issue. We note that the Court has recently requested a response in *Graf* after the Solicitor General had waived his right to reply

became "Military Judges" in the Military Justice Act of 1968 and thus no new appointment was necessary. Alternatively, he concluded that, if a new office had been created, the duties of the military judge were "germane" to those duties already required of a military officer with legal training: "The principle we glean from *Shoemaker* is that Congress may create a new office and give a military officer the duties of that office without making a new appointment necessary, if the duties are germane[.]" Pet. App. 8a.

Judge Crawford eschewed the opinion of Judge Gierke, and concurred only in the result. In her view the appointment of military judges need not comply with the Appointments Clause at all because of the special deference given to Congress when it regulates the land and naval forces. Her opinion does not mention *Buckley v. Valeo*, 424 U.S. 1, 132 (1976) (per curiam), in which this Court held that no class or type of officer is excluded from the reach of the Appointments Clause because of the special nature of their office or the plenary power of Congress over the subject area. Additionally, Judge Crawford reached her conclusion even though the Department of Justice (appearing as an *amicus* below, urging affirmance) disavowed that position in both its brief (Brief at 10) and at oral argument.

Chief Judge Sullivan and Judge Wiss each filed dissenting opinions rejecting the arguments in both of the majority opinions. The dissenters found no broad exemption to the strictures of the Appointments Clause based on the judges' status as military officers or military lawyers. Pet. App. 37a, 74a. Chief Judge Sullivan stressed the watershed events of the Military Justice Act of 1968 which for the first time created a "*professional judiciary*" in the military. Pet. App. 58a. (italics in original). He recognized that what had occurred was no mere transfer of duties, but was a clear break from past practice by creating the new offices of military trial and appellate judge. Judge Wiss disagreed with the lead opinion's

application of *Shoemaker* to this case, in particular its assertion that the assignment of specific and highly responsible judicial duties as a military judge is "germane to some nebulous notion of duties of legally trained military officers in general," *i.e.*, to the duties of the entire Judge Advocate General's Corps from which military judges are chosen. Pet. App. 83a.

The court did not revisit *Graf* where it had overruled Graf's due process objection to the lack of fixed terms of office for military judges for two reasons. First, *Graf* rejected the balancing test set forth in *Matthews v. Eldridge*, 424 U.S. 319 (1976), which had long been used to resolve Fifth Amendment due process claims. Instead, the court used the less exacting Fourteenth Amendment due process standard enunciated in *Medina v. California*, 112 S. Ct. 2572 (1992), which involved review of a state criminal conviction. Second, *Graf* treated dicta from *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), and *Palmore v. United States*, 411 U.S. 389 (1973), as approving the lack of fixed terms of office, and announced a new rule that military judges could not be removed in retaliation for their judicial decisions. Nowhere did the Court of Military Appeals suggest that military necessity precludes fixed terms for military judges generally, let alone for those who sit on the Courts of Military Review in the Washington, D.C. area or for courts-martial like these that are held in peacetime.

REASONS FOR GRANTING THE WRIT

This petition, like *United States v. Weiss*, seeks to establish minimum standards for the appointment of military judges and their retention in office for a fixed term. It does not seek to have the Uniform Code of Military Justice or the military justice system mirror that of Article III courts. Rather, it seeks to ensure that the separation of powers requirements embodied in the Appointments Clause, and the notions of fundamental fairness embodied in the Due Process Clause, are avail-

able to those tried by courts-martial. Taken alone, either the Appointments Clause or the Due Process violation would seriously undermine the fairness of the military justice system, but occurring together they call into question whether anyone in the armed forces can receive the minimal level of judicial independence that every justice system requires.

I. THE APPOINTMENTS CLAUSE VIOLATION

> Not since *Solorio v. United States*, 483 U.S. 435, 107 S.Ct. 2924 (1987), has an appeal presented questions of such fundamental importance to the institutional integrity and viability of the military justice system as does this one. Pet. App. 72a (Wiss, J., dissenting).

The Appointments Clause precludes Congress from placing the power to appoint inferior officers in anyone other than the President alone, the Courts of Law, or the Heads of Departments. U.S. Const. Art. II, § 2, Cl. 2. *Freytag v. Commissioner*, 111 S. Ct. 2631, 2642 (1991). There can be little doubt that military judges, who exercise extraordinary authority and discretion, are Officers of the United States and are subject to the Appointments Clause. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). No judge of the Court of Military Appeals disagreed with that proposition except Judge Crawford, and her position was specifically disavowed by the Department of Justice.

There is considerable force to the argument that military appellate judges are "superior" or "principal" officers, in which case the President must appoint them with the advice and consent of the Senate. But in any event, both military trial and appellate judges are at least inferior officers, and so they must be appointed either by the President, the Head of a Department, or by a Court of Law. No court has held that military judges are appointed to their judicial offices by any of the authorities listed in the Appointments Clause; the only question is

whether their appointment as military judges, after they have been duly appointed as military officers, must be made by one of the authorities set forth in the Appointments Clause.

The Appointments Clause preserves "the Constitution's structural integrity by preventing the diffusion of the appointment power." *Freytag*, 111 S. Ct. at 2638. As the Court reasoned in *Freytag*:

> The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint. Because it articulates a limiting principle, the Appointments Clause does not always serve the Executive's interests. *For example, the Clause forbids Congress from granting the appointment power to inappropriate members of the Executive Branch.* Neither Congress nor the Executive can agree to waive this structural protection. . . . The structural interests protected by the Appointments Clause are not those of any one Branch of government but of the entire Republic.

Freytag, 111 S. Ct. at 2639 (emphasis added).[4]

Relying on *Shoemaker*, two Court of Military Appeals judges found that the Appointments Clause had been satisfied because all military judges are commissioned officers of the Armed Forces, having been nominated by the President and confirmed by the Senate, although they have not been appointed to their judicial positions in that manner. Apparently recognizing that a presidential appointment had *some* limits—a Deputy Secretary of Defense could not simply move over to become the Assistant

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[4] A predictable consequence of having appointments made by an intermediate official, such as the Judge Advocate General, instead of by persons authorized by the Appointments Clause, is the homogeneity of the judges of the Courts of Military Review. Thus, none of the 35 current appellate judges is a woman, and two of the four appellate courts are comprised of only white males. The only two civilians sit on the five-member Coast Guard Court.

Attorney General for Antitrust or a Member of the Equal Employment Opportunity Commission—the opinion also concluded that there was no new office created when Congress amended the Uniform Code of Military Justice in 1968 to create the positions of military trial and appellate judges because the new positions were simply continuations of the old ones, with some modest changes. Even if that assessment were correct, and petitioners agree with the dissenters that it is not, that would at most allow those who were in a judicial position in 1968 —the "incumbent[s]" in *Shoemaker*'s words (147 U.S. at 301)—to continue in office without a new appointment. Stated another way, *Shoemaker* can at most solve the problem for those who were already serving in judicial positions in 1968, not for those who were yet to be appointed as judges, let alone those who were not yet military lawyers.

As a fall-back Judges Gierke and Cox argued that, under *Shoemaker*, Congress can add duties to an *existing* office without requiring that the person then in office be reappointed, so long as the "new" duties are "germane" to the "old" ones of that office. What they overlook is that *Shoemaker* arose in a one-time situation where Congress had added duties to persons who were already in offices to which they had been properly appointed. But there would never be a problem for future occupants of those offices since they would be appointed to positions encompassing both the "new" and "old" duties. However, for military judgeships, the problem is repeated whenever a non-judge military lawyer replaces a military judge who retires or is transferred to a new assignment.

Even if *Shoemaker* allowed those who were serving as "law officers" in 1968 to continue in the new office of military judge, those who became military judges thereafter would fail to meet *Shoemaker*'s "germaneness" test. The duties and powers of military judges, including all of those involved in petitioners' cases, are so different

from those of prosecutor, defense counsel, or legal advisor to a command—which is what most military lawyers do before they become military judges—that there is not simply an addition of a related duty, as in *Shoemaker*, but a substitution of a new job, with entirely new functions, for an old one. Surely, no one would contend that the two civilians on the Coast Guard Court of Military Review could be plucked from civilian life, even if they were administrative law judges working for the federal government, and placed on that Court without meeting the requirements of the Appointments Clause; the result should be no different for any other military judge, whether at the trial or appellate level. Similarly, no one would assume that a member of the staff of the General Counsel of the National Labor Relations Board could simply be "assigned" the additional duties of administrative law judge at that agency without satisfying the requirements of the Appointments Clause, yet that is the effect of the ruling below. Indeed, as both *Buckley* and *Freytag* make clear, it is the function that the individual is performing that is decisive in determining whether the Appointments Clause applies at all, and under that analysis there can be no question that military judges must be separately appointed because their functions differ so markedly from those performed by other military lawyers. At the very least, these quite expansive extensions of *Shoemaker* raise serious questions that this Court should address.

The decision below rests on even shakier ground because the decisive vote was cast by Judge Crawford. She implicitly rejected an extension of *Shoemaker* in favor of a much more sweeping rationale: that the Appointments Clause does not apply at all to military judges, although her rationale would lead to the conclusion that the Clause does not apply to any appointments in the Armed Forces. Her ruling conflicts with, but does not even attempt to distinguish, *Buckley*, which made clear that there are no subject-matter exemptions from the

Appointments Clause based on Congress's interest in, or plenary power over, particular subject areas. Judge Crawford's rationale also conflicts with decisions like *Rostker v. Goldberg*, 453 U.S. 57 (1981), and *Middendorf v. Henry*, 425 U.S. 25 (1976), which stand for the proposition that there are no wholesale exemptions from the Constitution simply because the case involves military affairs. Indeed, so extreme is Judge Crawford's ruling that the Department of Justice, which appeared below as an *amicus* in support of respondent, specifically rejected that position in its brief and at oral argument. It is highly unlikely that Judge Crawford would have taken the far more expansive route to affirming petitioner's convictions if she had been willing to accept the rationale put forward by Judge Gierke. Thus, if her "deference to Congress" analysis is in error—as it clearly seems to be—there were three votes to overturn petitioner's convictions, and it should be respondent, not petitioners seeking *certiorari*.

In this case it is not simply that the Judge Advocates General, who appoint military judges, are not listed in the Appointments Clause, but they are the supervisors of all military lawyers who practice in military courtrooms, including all of those who prosecute criminal cases on behalf of the United States. In addition, the Judge Advocates General, or the Assistant Judge Advocates General, writes the annual fitness reports of the members of each respective service's Court of Military Review, which are then used to decide the appellate judges' promotions, future duty assignments, and susceptibility to involuntary early retirement. Indeed, the Due Process implications of this particular appointment arrangement raise independent concerns that strongly reinforce the Appointments Clause objections.

The validity of the appointment of military judges under the Appointments Clause is a significant constitutional question which the Court should address immedi-

ately. The 2-1-2 division within the Court of Military Appeals attests to the serious debate on the merits of the issues. A split in the circuits is unlikely ever to arise, because the question has been fully and fairly litigated and resolved by the military justice system, thus potentially insulating it from review on habeas corpus. *See generally*, *Watson v. McCoffer*, 782 F.2d 143, 145 (10th Cir.), *cert. denied*, 476 U.S. 1184 (1986). In any event, as it did in *Freytag*, this Court should grant review now to resolve the dispute as promptly as possible.

II. THE DUE PROCESS VIOLATION

The reasons this Court should grant review on the second question presented are set out in the previously-filed *Graf* petition and are only summarized below. But first, it is worth noting that, although the two questions presented arise under different constitutional provisions, the defects involve common concerns of accountability and fundamental fairness to an accused. Non-compliance with each of the provisions is magnified by the lack of compliance with the other, such that there is a synergistic impact on the accused's rights. To further compound the problem, the Judge Advocate General can both appoint and remove military trial and appellate judges, yet he is also responsible for supervising the efficient working of the service's military justice system, including its prosecutors.

The lower court's application of *Medina*'s Fourteenth Amendment due process analysis to a *federal* Fifth Amendment due process claim is ample reason to hear the case. Indeed, in *Medina* this Court left open the correctness of one of its prior decisions—*United States v. Raddatz*, 447 U.S. 667, 677 (1980)—which had applied *Matthews v. Eldridge* to a due process challenge to a federal criminal conviction. Petitioners believe that respect for state legislative judgments and concerns of federalism, which loom so large in *Medina*, have no place where federal Due Process rights are at issue, but the

uncertainty created by *Medina* underscores the need for this Court to settle an issue that only it can resolve. In that regard we also note that the concerns about overturning specific judgments made by state legislatures (*Medina*), or with those made by Congress for the Armed Forces, *Middendorf v. Henry*, 425 U.S. 25, 44 (1976), are inapplicable here because there is no evidence that in 1968, when Congress established the offices of military trial and appellate judge, it gave any thought to terms of office, let alone specifically legislated to preclude them.

Certainly, in time of war or other serious exigency, military necessity may require some adjustments regarding the tenure of trial judges, although not for the appellate judges who comprise the four Courts of Military Review, which sit permanently in the Washington, D.C. area. Moreover, neither the government nor the Court of Military Appeals has sought to justify the lack of any fixed term of office on grounds of military necessity. Instead, the Court of Military Appeals relied on other alleged protections against improper retaliation against military judges for unpopular decisions—some of which it first announced in *Graf*—although none of them can be invoked by an accused, even if they were actually, as opposed to theoretically, available to the judges themselves. But even if those protections served to prevent naked retaliation, they cannot possibly guard against the more subtle and virtually undetectable problems of adverse or "faint praise" fitness reports that can have significant impacts on promotions, future assignments, and susceptibility for involuntary early retirement for all military judges.

At bottom, the Court of Military Appeals fell woefully short of justifying a massive exception to the generally-accepted principle of American jurisprudence, as reflected in such due process cases as *Tumey v. Ohio*, 274 U.S. 510 (1927), and in the nearly universal fact that state judges have fixed terms of office, such that judicial independence for those who preside at criminal trials and

hear criminal appeals is an absolute minimum protection for the accused. The due process issue alone is sufficiently important to warrant plenary consideration by this Court, especially because the terms of office of a military judge can be cut short by a military officer who is the ultimate superior of both the judge and the prosecutor.

CONCLUSION

For the reasons stated, this Court should grant review in order to bring the military courts-martial system in line with accepted principles of American jurisprudence, and ensure that trials by court-martial are conducted in a fair and impartial manner.

Respectfully submitted,

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